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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

Petitioner,

v.

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA, *et al.*,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

*JOHN E. TULL III
PETER G. KUMPE
J. LEON HOLMES
WILLIAMS & ANDERSON
Twenty-Second Floor
111 Center Street
Little Rock, AR 72201
(501) 372-0800

Attorneys for Respondent

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

Petitioner represents certain disgruntled family members who sued an insurance company for breach of contract because it paid $2,000,000 in life insurance proceeds to their brother rather than the estate. Payment was made January 19, 1978, and their action was filed on April 20, 1989, more than 11 years after payment. A jury returned a verdict for $2,000,000 in compensatory damages plus $l,000,000 in punitive damages, but the Arkansas Supreme Court unanimously reversed the case on the ground that it was barred by the statute of limitations. Following the reversal, petitioner claimed that the Chief Justice of the Arkansas Supreme Court (and the author of the opinion) was biased because he had gone quail hunting with Herschel Friday of the Friday, Eldredge & Clark law firm ("Friday Firm"). Petitioner claimed the Friday Firm had an interest in the outcome even though they were not a party to the lawsuit. In this context, the petitioner raises the following questions:

1. Whether petitioner's due process rights were violated because the Chief Justice of the Arkansas Supreme Court purportedly went quail hunting with a member of a law firm whose lawyers were witnesses in the law suit.

2. Whether petitioner's due process rights were violated because the Arkansas Supreme Court noted that two family members represented by petitioner had also received notice that the estate of J.P. Stoltz was initially named as beneficiary of his life insurance policies.

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STATEMENT OF THE CASE

A. Introduction

The Arkansas Supreme Court in a unanimous decision reversed a jury award in favor of petitioner because the lawsuit was filed more than 11 years after the act in question and the statute of limitations had run. The Arkansas Supreme Court also noted that the record was devoid of any evidence of fraudulent concealment necessary to toll the running of the statute of limitations. Following the reversal, petitioner asserted for the first time that a "reliable source" had informed him that the Chief Justice of the Arkansas Supreme Court and Herschel Friday had gone quail hunting together on several occasions. Subsequently, "petitioner instructed his attorneys to investigate" the matter and in short shrift a motion for rehearing and vacatur was presented to the Arkansas Supreme Court. Both were denied.

Even were the underlying facts true, the issues presented are not novel and there is no reason for this court to grant certiorari. The first and second questions presented by the petition are the same and do not need to be considered separately.

B. Proceedings Below

On December 18, 1975, J.P. Stoltz applied to First Pyramid for life insurance totalling $2,000,000. The application designated the proposed insured's estate as beneficiary. Later, for tax reasons the application was revised to seek two policies: one in the amount of $50,000 and another for $1,950,000. After the applications were accepted, J.P. Stoltz completed and delivered to First Pyramid beneficiary agreements naming his oldest son, Steve Stoltz, as beneficiary.

That change was accepted in writing by First Pyramid without the countersignature on behalf of the Oklahoma trustee that acted as "legal" owner of the policy. To generate greater tax savings, First Pyramid designated these policies to be issued in Oklahoma because that State's law authorized higher group policy limits than did Arkansas law. J.P. Stoltz also completed and delivered a change of ownership form to First Pyramid naming his son owner of the larger ($1,950,000) policy to avoid paying estate tax on the policy proceeds.

J.P. Stoltz died on December 18, 1977. Only his son Steve Stoltz claimed the policy proceeds. Before paying the claim, First Pyramid sought the advice of its attorney, Allan W. ("Dick") Horne. Mr. Horne concluded in a memorandum ("Horne memorandum") that Steve Stoltz was the legal beneficiary, but recommended that the proceeds be interpleaded because of uncertainties in file documentation including the lack of the Oklahoma trustee's signature on the beneficiary agreement. Mr. Horne's advice was summarized in a memo:

> *SUMMARY*: There is a substantial risk whether payment is made to the son or to the estate.
>
> (a) There appears *less risk if payment is made to the son* since those involved seem sure he was the intended beneficiary.
>
> (b) There appears *more risk if payment is made to the estate* because of the insured's apparent intent to benefit the son.

> (c) *In either event*, exposure could be reduced by requiring an indemnity agreement from either the son or the estate.
>
> (d) An interpleader action is probably the safest course. However, the company could be exposed to a suit from the loser, i.e., the son or the estate. *Therefore, this alternative is not a complete solution either.* [emphasis added]. (App. 1.)

At a later meeting with officers of First Pyramid, and after further consideration, Mr. Horne concurred that paying the son without interpleader was "the best course." On January 19, 1978, respondent First Pyramid Life Insurance Company of America ("First Pyramid") paid James Stephen Stoltz ("Steve Stoltz") $2,000,000.

During separate litigation commenced on May 4, 1984, by the Internal Revenue Service to collect unpaid taxes, an attorney at Friday, Eldredge & Clark ("Friday Firm") acting as counsel for J.P. Stoltz's estate discovered and reviewed the Horne memorandum. The estate counsel considered the irregularities in the file and concluded that Steve Stoltz was the legal beneficiary, but did not report the discovery to any estate beneficiaries except Steve Stoltz, who was also executor of the estate. On September 3, 1987, over nine years after the policies had been paid, certain beneficiaries of the Stoltz estate commenced an action in Faulkner County Probate Court to challenge the management of the estate. Discovery in the probate action again produced the Horne memorandum. On April 20, 1989, those dissatisfied estate members commenced this action.

This case was brought originally as a negligence and breach of contract action coupled with a claim of bad faith. Because of the 11-year delay in bringing the claim, petitioner also alleged fraudulent concealment in an attempt to overcome the limitations defense. The original trial judge was the Honorable Perry V. Whitmore. Judge Whitmore overruled a motion for summary judgment on the limitations issue after hearing argument on two separate occasions, concluding:

> To avoid the loss of those causes of action, the plaintiff must prove either the defendant insurance company by its overt acts caused the legal right to be hidden and thereby become time barred; or there existed a specific legal relationship between the parties that in and of itself obligated an overt disclosure of the existence of those claims. An insurer/beneficiary relationship does not seem to create that legal obligation; however, on the claim of a factual coverup, the plaintiff should have its day in court.

At this point, the case remained a negligence and contract case with a claim of bad faith. The trial court recognized that the tolling of the statute under the doctrine of fraudulent concealment depended on proof that First Pyramid acted to conceal the claim.

Following Judge Whitmore's retirement, the limitations issue was again presented to the trial court. This time it was coupled with a motion for summary judgment which claimed that Steve Stoltz was the contract beneficiary as a matter of law. During the course of the argument, petitioner's counsel asserted

that the Friday Firm was implicated in a conspiracy to conceal a fraud from the estate while that firm was the estate's attorney. On the limitations issue, The Honorable Chris Piazza concluded that fraudulent concealment was an issue for the jury, but unlike Judge Whitmore who focused on conduct by First Pyramid, Judge Piazza emphasized petitioner's conspiracy allegation as creating a jury issue:

> Then you have this allegation, you know, that there was some type of fraud there that the association [by First Pyramid through the Friday Firm lawyer-Buddy Sutton] with the bank, with the loan that was paid off, the liabilities of the corporation the son paid off, how it was interconnected.

Here, Judge Piazza initially and correctly notified petitioner he would be required to present evidence of a fraudulent conspiracy between First Pyramid and the Friday Firm to escape the operation of the statute of limitations.

During the trial from August 5-10, 1991, petitioner abandoned the allegation of a conspiracy between the Friday Firm and First Pyramid and failed to present any evidence of such a conspiracy. The trial court submitted the case over the objection of First Pyramid on a general verdict under a contract theory coupled with instructions characterized as "fraud due to nondisclosure." Petitioner tendered no bad faith instruction and withdrew his negligence instruction immediately prior to the reading of the instructions. The jury returned a general verdict and Judge Piazza directed a verdict for compensatory damages of $2,000,000. The jury also awarded punitive damages

of $1,000,000. After considering several post-trial motions concerning trial errors and objection to the proposed form of judgment, the trial court entered judgment as assessed by the jury and awarded attorneys' fees and interest. First Pyramid filed a timely notice of appeal from the judgment to the Arkansas Supreme Court. Petitioner cross-appealed and sought additional interest and penalties on the jury verdict.

On December 21, 1992, the Arkansas Supreme Court unanimously reversed the lower court. With respect to the limitations issue, the Arkansas Supreme Court characterized petitioner's position in its opinion of December 21, 1992, as follows: "Representatives of the estate contend that the statute of limitations in this action was tolled by First Pyramid's allegedly fraudulent concealment of the controversy." On that issue, the dispositive sentence in the Court's opinion is: "There is simply no evidence of record that First Pyramid attempted to fraudulently conceal, 'coverup' or misrepresent to the estate the problem with determining the proper beneficiary of J.P. Stoltz's insurance policy."

Subsequently, on January 19, 1993, petitioner filed a Motion for Vacatur, to Disqualify and, in the Alternative, to Appoint a Special Master and Motion for Extension of Time to File Petition for Rehearing. In this pleading, petitioner alleged that the author of the opinion of the Arkansas Supreme Court, The Honorable Chief Justice Jack Holt, Jr., had favored First Pyramid because of a substantial social relationship between Chief Justice Jack Holt, Jr. and Herschel Friday of the Friday law firm. In the motion for

vacatur, petitioner's counsel relied upon a letter purportedly authored by his client. [App. 2]

On January 22, 1993, petitioner filed a petition and brief for rehearing in the Arkansas Supreme Court alleging, *inter alia,* that the Court's opinion holds that knowledge "obtained by a distant heir and a potential stranger to the estate, somehow constitutes notice to the estate, and its minor children, the rights and obligations, thereby violating the Fourteenth Amendment to the U.S. Constitution." [App. 3] Petitioner raised no other due process rights.

On February 15, 1993, the Honorable Chief Justice Jack Holt,Jr. filed an opinion declining to disqualify. [App. 4] On February 18, 1993, petitioner filed a Motion for Reconsideration of the decision not to disqualify. [App. 5] On February 22, 1993, the Arkansas Supreme Court denied the Petition for Rehearing, Motion for Stay and Motion for Reconsideration of Motion for Vacatur, to Disqualify and, in the Alternative, to Appoint a Special Master. The case was remanded to the trial court on March 15, 1993. Petitioner has now filed his Petition for Writ of Certiorari before this Court.

The Friday Firm is the state's largest law firm and is held in the highest regard. Mr. Herschel Friday is consistently recognized as one of the finest lawyers in Arkansas and the country and his integrity is beyond reproach. The client list of the Friday Firm includes many banks and leading businesses but neither the firm nor its clients have ever received "special" consideration from Chief Justice Holt since he was sworn in as the Chief Justice of the Arkansas Supreme Court in 1985.

The Friday Firm was not an interested party in this litigation. The Estate of J.P. Stoltz was represented by the firm and although petitioner continually made allegations of the existence of a conspiracy between the firm and First Pyramid, he dropped the allegations at trial and failed to present any evidence in support thereof. Mr. William H. "Buddy" Sutton-a leading Friday Firm lawyer-was not a member of the board of First Pyramid at the pertinent time.

The unsatisfied family members who bring this action continue to seek monetary relief and have recently filed an action against the Friday Firm. These family members have also settled their claim against their brother-Steve Stoltz-who served as executor of his father's estate.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari is not filed in good faith. Essentially, petitioner claims that because he has "reliable information" that the Chief Justice of the Arkansas Supreme Court went quail hunting with a member of the Friday Firm, a law firm that was not a party to the proceeding and a firm that has now been sued by the petitioner, his due process rights were violated by the failure of the Arkansas Supreme Court to recuse itself. There are no cases in the United States where such an insignificant social relationship has resulted in the relief sought by petitioner. Indeed, if the Supreme Court found that this type of social interaction constituted grounds for recusal, virtually every trial and appellate judge in rural areas throughout the country would be forced to recuse.

REASONS FOR DENYING THE PETITION

A. Petitioner's Due Process Rights Were Not Violated Because Any Insignificant Social Relationship Between The Honorable Chief Justice of the Arkansas Supreme Court And A Nonparty Did Not Constitute Grounds for Recusal.

1. The issues presented do not concern constitutional and statutory questions that are likely to have widespread general impact.

The first two questions presented in the petition are whether and under what circumstances a party's due process rights are violated when an appellate judge refuses to recuse himself. This Court has already decided this question in *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1680 (1986). As will be discussed later, *Aetna* is not in tension with this case, rather it simply is factually distinguishable because there was no reason for the Arkansas appellate judge to recuse. Thus, the question is settled and there is no reason for the Supreme Court to reconsider the clear impact of *Aetna*. In fact, this petition is nothing more than petitioner's last gasp to revive the case.

The discovery proceedings and trial of this matter are best described as acrimonious. The petitioner represents certain family members who have sued other family members over the estate of their deceased father. The respondent life insurance company, whose predecessor provided life insurance policies on their father, was caught in the middle. After a hard-fought trial, the Arkansas Supreme Court unanimously reversed the substantial jury award in its entirety because the applicable statute of limitations barred the action. Following that reversal, petitioner has as-

serted scandalous and libelous claims regarding the Chief Justice of the Arkansas Supreme Court and one of the most respected law firms in the State of Arkansas. It was only after the reversal that the petitioner and his counsel made these baseless charges of a "long standing social relationship with an interested party."

Somewhere along the way, courts must stand up and put a stop to petitioner's tactic of trial by terrorism, insinuation and innuendo. Petitioner's irresponsible and irrational demands that the Chief Justice and the entire Court should vacate the Court's opinion and step aside from the case cannot be sanctioned. If the Arkansas Supreme Court had recused or if this Court gave credence to the personal attack on the Chief Justice and the Friday Firm, seven new judges would be appointed by Governor Jim Guy Tucker. If those seven judges decided against petitioner, he would no doubt allege that Governor Tucker was somehow involved in the conspiracy that the petitioner continues to allege in the absence of any evidence. Moreover, petitioner's position, if given credence by this Court, would require reopening dozens of cases involving the Friday Firm which have been decided by the Arkansas Supreme Court since January 1, 1985, the date upon which Jack Holt, Jr. was sworn in as Chief Justice. If the Chief Justice or any other member of the appellate court was required to recuse from this case, the same could be expected in every future case in which the Friday Firm is involved. Moreover, the door will be open for every party who loses an appeal to search for some casual, social connection between a member of the Arkansas Supreme Court and someone involved, even tangentially, in the

matter. Likewise, every trial judge who hears a case involving a lawyer with whom he has had some social connection will be forced to recuse. Pandora's box would be opened, and its evils loosed, never to be captured again.

2. Petitioner's claim that the Chief Justice of the Arkansas Supreme Court had a longstanding social relationship with an interested party is baseless.

The petitioner's claim that a "substantial long standing social relationship" exists between the Honorable Chief Justice Holt and Mr. Herschel Friday is without support. Petitioner submits his own pleadings, self-serving affidavits and a copy of his complaint filed with the Arkansas Judicial Discipline and Disability Commission in "support" of his wild accusations. Petitioner attempts to hide behind a letter purportedly written by him and advice purportedly given by other, unnamed, lawyers and other unidentified persons. In his statement of the case, petitioner asserts that he instructed his attorneys to investigate whether a long standing and close friendship existed between the Chief Justice and the Friday firm. This "instruction" was given in the form of a letter from petitioner to his lawyers.

No lawyer should have caved in to a demand from a client that a Motion for Vacatur or Petition for Writ of Certiorari be filed, even if the client demanded it (the letter asked only for an investigation and advice) and even if the demand came from the client in a bona fide manner. It should be noted that the petitioner's letter giving rise to the Motion for Vacatur and the Petition for Writ of Certiorari has the same typeset as the Motion for Vacatur and brief in support thereof signed by the attorney. Further,

Counsel's affidavit in support of the motion for vacatur states that Mike Stoltz "contacted me around Christmas, 1992 . . . and informed me that he had heard of quail hunting trips taken to Herschel Friday's farm by Jack Holt, Jr. . . . and trips to leased land in the State of Texas." [App. 6] The letter, which is dated January 12, 1993, and stamped as received on January 13, 1993, says "I am writing to inform you of some very upsetting rumors I have heard in the last couple of weeks." Thus, the letter indicates that its purpose is "to inform" counsel of something that counsel's affidavit says had been discussed three weeks prior to the letter. The letter asked that counsel "investigate these rumors immediately and notify me of my legal options." However, the letter declined to identify the source of the information, citing only a "reliable source," which is an extremely odd way for a client to ask his lawyer to carry out an investigation. By January 19, 1993, six days after the letter is stamped as received by counsel, the investigation had been completed, a course of action had been determined, legal research had been completed, a lengthy brief had been written, and the motion for vacatur had been filed.

Petitioner's lawyer should have informed his client that casual, social contact, such as a quail hunting expedition,[1] is no grounds for disqualification and does not give rise to an appearance of impropriety. Petitioner's lawyer should have informed his client

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[1] For purposes of this portion of the brief, respondent will give credence to the claim that a quail hunting expedition had occurred, but in fact there is absolutely no evidence that Chief Justice Holt has ever been quail hunting with Herschel Friday or anyone else from the Friday law firm.

that there are no cases in the United States where a judge has been disqualified because he had been quail hunting with some lawyer who might or might not stand to benefit from a decision of the court. The applicable law is stated in *Matthews v. Rogers*, 279 Ark. 328, 333-4, 651 S.W.2d 453 (1983), where the Arkansas Supreme Court stated:

> In this State trial judges often know most, if not all, of the attorneys who practice before them. They may have attended the same schools, churches, or belong to the same civic clubs. Most are members of the same bar association. . . . Those friendships within the bench and bar do not, of themselves, cause prejudice. The public and the clients are aware of their mutual friendships and acquaintances.

"Friendship with a member of the bar is not a ground for recusal." *Committee For Utility Training, Inc. v. Hamilton*, 290 Ark. 283, 286, 718 S.W.2d 933 (1986). There is no allegation here that Mr. Friday and Chief Justice Holt belong to the same church, belong to the same civic organizations or visit in one another's homes. The Arkansas Supreme Court correctly deduced that if it gave in to petitioner's demands it would destroy the possibility of finding local judges to hear cases in most, if not all, of the judicial districts in Arkansas, where the bar is small and judges and lawyers unavoidably have social acquaintances which are often much closer relationships than that alleged to exist between Mr. Friday and Chief Justice Holt.

The assertion that the Friday Firm stood to benefit from a reversal in this case is, like so many other

allegations made by the petitioner, a distortion of the truth. If the Arkansas Supreme Court wanted to protect the Friday Firm, the best way to do that would have been to affirm the judgment. By reversing, the door was opened for petitioner to make a claim against the Friday Firm.[2] Had the judgment been affirmed, petitioner would not have had a claim against that firm. Moreover, as petitioner well knows, respondent filed a third-party complaint before the trial against four other parties, and the Friday Firm was not among them. Indeed, it is hard to fathom what respondent could have alleged against the Friday Firm. Is it petitioner's suggestion that First Pyramid could have sued the Friday Firm for not advising the Estate of J.P. Stoltz to sue First Pyramid?

Thus, the insinuation that the Arkansas Supreme Court favored the Friday Firm by reversing the judgment in this case is, to put it charitably, a flight of the imagination. Further, a review of the record of the Arkansas Supreme Court clearly reveals that the Friday Firm does not receive special treatment from the Arkansas Supreme Court. A simple review of recent advance sheets reveals a number of cases in the past few months in which the Arkansas Supreme Court ruled against the Friday Firm's interest. Recently, the Arkansas Supreme Court ruled against the Friday Firm itself in *Pope County v. Friday, Eldredge & Clark*, 313 Ark. 83, 852 S.W.2d 114 (1993). In *Pope County*, the Arkansas Supreme Court decided that an action against the Friday Firm for legal malpractice

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[2] In fact, on May 3, 1993, petitioner filed a complaint in Pulaski County Circuit Court against the Friday Firm styled *J. Michael Stoltz v. Herschel H. Friday d/b/a the Law Firm of Friday, Eldredge & Clark, et al.*, No. 93-2813.

was not barred by the statute of limitations. In another recent case, *Arkansas Indus. Dev. Comm'n v. FABCO*, 312 Ark. 25, 847 S.W.2d 13 (1993), in which Mr. Friday was representative counsel, the Arkansas Supreme Court denied the Friday Firm's client an award of reasonable attorneys' fees but awarded attorneys' fees to the opposing party. See also *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993); *Potlatch Corp. v. Arkansas City School Dist.*, 311 Ark. 145, 842 S.W.2d 32 (1992); *Porter v. McCuen*, 310 Ark. 562, 839 S.W.2d 512 (1992); *Younts v. Baldor Electric Co.*, 310 Ark. 86, 832 S.W.2d 832 (1992).[3]

Petitioner's wild accusation that Chief Justice Holt is somehow biased in favor of the Friday Firm is equally ludicrous. Once again a review of the public record is compelling. Chief Justice Holt has authored several majority opinions in cases involving the Friday Firm, and in the preponderance of cases wrote an opinion adverse to the interests of that firm. In fact, a computer search[4] identified eighteen majority opinions authored by Chief Justice Holt in which the Friday Firm represented a party—only seven of those

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[3] Ironically, the day petitioner filed the Motion for Vacatur in the Arkansas Supreme Court, that court issued an opinion in a major case deciding by a 4-3 vote against the interest of the Friday Firm. *Hasha, et al. v. City of Fayetteville, et al.*, No. 92-578 (Jan. 19, 1993). Chief Justice Holt joined the majority opinion.

[4] Chief Justice Holt took the bench in 1985. A computer search using Case Base, a research database with Arkansas cases on CD-ROM, was conducted for all cases since 1985 authored by "Holt" in which "Friday" occurred in the "Attorneys on Appeal" segment of the official report. Each case was then verified individually and the outcome recorded.

opinions favored the Friday Firm. Thus, in nearly two-thirds of the cases Chief Justice Holt rendered an opinion adverse to the Friday Firm. A table listing all eighteen cases and the outcome of each is attached hereto as Appendix 7.

The opinions by Chief Justice Holt adverse to the Friday Firm include one 4-3 decision in a case of first impression that easily could have gone the other way. Mr. Friday was a signatory to the brief in that case. *Moore v. Missouri Pacific R.R.*, 299 Ark. 232, 773 S.W.2d 28, 6 A.L.R. 5th 1188 (1989). In another case, Chief Justice Holt wrote the majority opinion against the Friday Firm and then dissented when rehearing was granted and the Court ruled in favor of the Friday Firm. *Register v. Oaklawn Jockey Club, Inc.*, 306 Ark. 318, 811 S.W.2d 315, opinion on reh'g, 306 Ark. 321, 821 S.W.2d 475 (1991).

Further, petitioner misstated several Arkansas and United States Supreme Court decisions in support of his assertion that the Arkansas Supreme Court was required to recuse itself in this matter. In *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415 (1988), Justice John Purtle authored an opinion by the divided Arkansas Supreme Court in which a $5,000,000 plaintiff's award was affirmed. The critical issue in the underlying case was whether the driver of a log truck involved in an accident was an independent contractor so as to insulate other defendants. At the time, Justice Purtle had a claim against one of the insurance companies representing a defendant and that claim related to an issue of an independent contract which, as noted, was the main issue in *Sturdivant*. In recognizing the need for recusal, the Arkansas Supreme Court relied upon *Aetna Life Ins.*

Co. v. Lavoie, 106 S.Ct. 1680 (1986) and particularly noted that in the Aetna case "it was suggested that Justice Embry had written an opinion deciding his own lawsuits." In light of *Aetna* and *Lilejeberg v.Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Arkansas Supreme Court recused. Neither *Johnson v. Sturdivant* or *Aetna Life Ins. Co. v. Lavoie* have any precedential value for this case. Justice Holt did not have any personal interest in the case nor did he have a personal involvement with any of the parties.

Petitioner also cites *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990) and *Patterson v. R.T.*, 301 Ark. 400, 784 S.W.2d 777 (1990) in support of his contention that his due process rights have been violated. However, in *Venhaus*, the record clearly reflected that the chancellor exhibited bias and had a personal interest in the matter exhibited by ordering that $700,000 of taxpayers funds be given to assorted charities to which she was connected. Likewise, in *Patterson v. R.T.*, the same chancellor exhibited her bias when questioning witnesses on the record. Conversely, in the instant action Justice Holt exhibited no bias and, in fact, had no relationship or interest with any of the parties to the litigation.

Much of petitioner's brief in support of Petition for Certiorari is devoted to rearguing the underlying case.[5] However, the only real issue determined by the

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[5] Included as a part of petitioner's effort to reargue the case is Appendix Ex. A to the Brief, which purports to be "an excerpt from the testimony of witnesses and exhibits at trial." In fact, it is a tendentious, argumentative, and selective abstract of testimony that takes much out of context and actually fabricates

Arkansas Supreme Court was whether there was substantial evidence that First Pyramid engaged in fraudulent concealment of petitioner's claim. There was and is no evidence, much less substantial evidence, of fraudulent concealment. The fraudulent concealment issue was argued extensively in briefs filed before the Arkansas Supreme Court and at oral argument. Simply put, there is no evidence of an impropriety by the Arkansas Supreme Court and there is no need to reargue the limitations issue.

B. The State of Arkansas Did Not Violate Petitioner's Right To Due Process And *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) Is Inapplicable.

Petitioner suggests that the opinion of the Arkansas Supreme Court is contrary to *Tulsa Professional Collection Services, Inc. v. Pope, supra.* That assertion, like so much of petitioner's counsel's argument is misplaced. The issue in *Pope* was whether the involvement of the Oklahoma probate court in executing the non-claim provision of the. probate code constitutes state action under the Fourteenth Amendment. 485 U.S. at 486. Nothing in the Arkansas Supreme Court's opinion in this case even remotely addresses that issue. The opinion in *Pope* is crystal clear that a private party may invoke a statute of limitations without implicating due process. *Id.* Therefore, the

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part. See the addendum to this brief. Petitioner did not complain about respondent's abstract of these matters before the decision on the merits (Cf. Rule 9(e)(1)), but now he has re-abstracted the evidence to suit his purposes, a clear violation of Rule 9(d). Among other things, this new, partial argumentative abstract violates the requirement that the abstract be "without emphasis."

Pope opinion and the opinion in this case of the Arkansas Supreme Court of December 21, 1992, are entirely consistent.

It should also be noted that this section of the Petition for Writ of Certiorari reveals the inconsistencies in petitioner's positions, and the desperation of petitioner's counsel to attempt to resurrect his multimillion dollar verdict. Petitioner twists and turns the law to suit his purpose. On the one hand, the petitioner has repeatedly argued that the estate was unaware of its potential claim until "8/8/88" because the only person with notice was the executor, Steve Stoltz, who had a conflict of interest with the other beneficiaries. Therefore, petitioner argues the statute of limitations was tolled until the estate received notice independent of the executor.

At trial, however, it was revealed that a sister of J.P. Stoltz and a brother-in-law (both of whom are estate beneficiaries represented by petitioner) had actual notice that J.P. Stoltz had at one time named his estate as the beneficiary of the life insurance policy. The opinion of the Arkansas Supreme Court noted this fact and now petitioner cries foul and asserts that the estate cannot be held accountable for knowledge possessed by other beneficiaries. Petitioner, thus, apparently concedes that notice to the executor and the attorneys for the estate was the only notice that could, and did, bind the estate. See e.g. *Ford's, Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989); *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968); *Farr v. Newman*, 14 N.Y.2d 183, 199 N.E.2d 369 (N.Y. App. 1964). Since the executor, the estate attorneys and independent beneficiaries all received notice of the potential claim, petitioner is

forced to take inconsistent positions in an attempt to have his cake and eat it too.

In summary, this Court has previously held that a private person's assertion of an applicable statute of limitation does not constitute state action. Thus, there was no due process violation and, further, notice was proper and binding on the estate.

CONCLUSION

The petition filed in this matter, like other pleadings filed by petitioner, does nothing but repeat arguments already made, considered and rejected. Further, the petitioner makes the irresponsible and scandalous assertion that the Arkansas Supreme Court issued a fraudulent opinion based on nothing more than an unfounded rumor that the Chief Justice allegedly went quail hunting and participated in other social activities with Herschel Friday of the Friday, Eldredge & Clark law firm. "Judges are presumed to be impartial and the party seeking disqualification bears a substantial burden proving otherwise." *Korokov v. Korokov*, 33 Ark. App. 194, 197, 803 S.W.2d 948 (1991). Petitioner is light years away from meeting this burden. Neither First Pyramid nor the judicial system should be held hostage to the kind of tactic that has been the pattern in this case. It is the duty of the Court to stand up and say, enough is enough. Giving in to petitioner's tactics would be like giving in to terrorists who threaten destruction or murder unless ransom money is paid. It only encourages the same kind of behavior in the future.

August 25, 1993

Respectfully submitted,

*JOHN E. TULL III
PETER G. KUMPE
LEON HOLMES
WILLIAMS & ANDERSON
111 Center Street
Twenty-second Floor
Little Rock, AR 72201
(501) 372-0800

Attorneys for Respondent

**Counsel of Record*

APPENDIX

APPENDIX 1

MEMORANDUM

RE: First Pyramid Policy Issued to James Patrick Stoltz, Deceased
DATE: January 18, 1978

SITUATION: James Patrick Stoltz died December 18, 1977 while covered by four policies issued by First Pyramid. Two of these policies were connected with the Flex 70 Trust totalling $2,000,000.

Jim Duran requested that we review the policies prior to payment, to make sure proper payment is being made. In doing so, certain discrepancies were noted concerning the $1,950,000 term policy. The $50,000 whole life policy may have similar problems and should be reviewed. The purpose of this Memorandum is to highlight the sequence of events concerning the problem and the possible positions and courses of action which may be available.

I. Sequence of Events:

1. $1,950,000 Policy was issued to "The Insured" dated February 26, 1976 and named "The Estate of the Insured" as beneficiary.

(Line 29 in the application where "owner" designated is garbled) (Dated 12/18/75) (Applicant shown as Flex 70 Trust however).

2. Transfer of Ownership and Beneficiary Agreement signed by the Insured as "Policyholder" on May 1, 1976, naming James Stephen Stoltz (son) as owner and primary beneficiary.

The Agreement was filed and record made by Company on March 22, 1976 Title page on policy changed to strike "Insured" and show James Stephen Stoltz, son, as owner,

but beneficiary left as "The Estate of the Insured" on face of policy. File copy has notation that beneficiary was changed by rider and the same may have been inserted in the policy.

3. Ron Mason memo to Paul Dixon on August 9, 1976 that changes in ownership are ineffective without Trustee's signature. Requested new change forms be completed if Mr. Stoltz still wants change, or return of policy for removal of previous change of ownership otherwise. (Beneficiary not referred to)

4. Worksheet prepared by A. Gray on 8/18/76 directing that new policy be typed showing ownership as "Flex 79 Trustee" and directing removal of 3/1/76 ownership transfer from policy. No written direction or consent by insured or son present found in file. Acknowledged 8/31/76.

5. New (substitute) policy issued 8/76 showing as owner "The Insured and Flex 70 Trust" dated February 26, 1976 and naming as beneficiary "The Estate of the Insured." Any prior beneficiary rider which may have been included was apparently removed.

6. Immediately prior to death, J. Moses responding to inquiry by agent stated that son is owner and beneficiary which agent responds is proper. Agent requested copies of March, 1976 ownership and beneficiary changes, which are supplied.

7. December, 1976, Mr. Stoltz dies.

8. December 20, 1976, Jim Duran notified David Kane that son is beneficiary and requested claim for completion and return of policy which is done.

II. Analysis:

The objective in determining how to properly make payment at this time is to prevent, if possible, exposure to suit by another party at a later date claiming payment should properly have been made to such party.

INTENT OF PARTIES: All indications at this time are that the intent of the parties was that the son be beneficiary of the policy.

Judy Moses understands the purpose of the August, 1976 change was to name the son as owner and beneficiary ab initio to avoid the possibility of the policy being pulled into the insured's estate and possibly avoid its seizure by taxing authorities for income taxes allegedly due. She believes it was erroneous to name the insured or his estate in any fashion on the policy page prepared in August dated February 26 1976.

Elizabeth Oswald understands the purpose of the August, 1976 change was to show how the policy should have originally been issued pursuant to the application (Insured and Flex 70 Trust as owner and Estate as beneficiary) and that the March, 1976 ownership and beneficiary changes were intended to remain in force, (despite the fact that this is inconsistent with the Mason memo requiring the Flex 70 Trustee's signature for this to occur).

She believes it was erroneous not to include the ownership and beneficiary changes as riders at that time.

The agent in December, 1976 conversation with Judy Moses (prior to Insured's death) expressed satisfaction with her statement that the son was owner and beneficiary at that time stating this was the intent of Mr. Stoltz.

SON AS BENEFICIARY: The designation of the insured's son as owner and beneficiary would seem to be effective under the following circumstances.

1. If the fact that the policy was originally issued inconsistent with the application does not control over the actual policy specifications; if the insured had the power to change ownership and beneficiary in March, 1976 and did so, and if the August, 1976 change is of no effect since not authorized or consented to by the owner of record when accomplished. Mason's memo would have been

incorrect when written under this reasoning. The fact the policy when actually reissued did not reflect these changes must also be considered as having no effect.

2. The second line of reasoning leading to this result would follow the reasoning of #1 except that the August, 1976 changes dated February, 1976 were permissible because of consent or otherwise effective ab initio, and the March, 1976 ownership and beneficiary changes are effective because they follow the effective date of the changes. This reasoning must disregard the Mason memo requiring Trustee signature, by reasoning that some type of consent is present, as well as the fact the changes were not included as riders in the policy. (Oswald understanding)

3. As a third alternative, consider #2 except that the policy as originally issued was inconsistent with the application and the application controls.

4. A fourth line of reasoning would be that the August change should have named on the policy specification page the son as owner and beneficiary, removing any need for new beneficiary and ownership change forms and all parties were consenting to this despite fact no written record was present. This also assumes this clerical correction may be made at this time.

There are certain other variations but these are the principal themes. It should be noted that none seems fully satisfactory from a contract law standpoint since certain terms of the contract must be ignored, proper signatures were not obtained, or required by the Company, certain changes must be allowed "ab initio" which is of questionable validity, especially in the absence of a clear intent, etc.

ESTATE AS BENEFICIARY: Circumstances which would indicate that the Estate of the insured is the proper beneficiary are as follows:

(a) If the signature of the trustee was required at any point and was not obtained. (Several variations)

(b) If the final policy page prepared as the most recent statement of Company ownership and beneficiary records,to which the insured could have objected if he desired to, controls.

III. Alternatives:

The principal dangers of each course of action involves exposure to (a) contract liability to another party after payment to a first party had been made and (b) tort liability for negligence or misrepresentation to a person other than the person to whom payment was made. Various procedures which could be followed to possibly cut off such actions include use of interpleader or formation actions to clarify the contract, obtaining indemnity or waiver agreements to cover possible liability, etc.

Contract actions could conceivably arise regardless of whom payment was made to. These could possibly be successful if the court construed the situation contrary to the Company's interpretation.

A similar situation is present with tort actions if a court found that the intent of Mr. Stoltz was to make payment one way and, through error by the Company, or perhaps its agent, this intent was not carried out. The information we have at this point is that the intent was to benefit the son. The possibility that someone else could come forward later with contrary evidence cannot be ignored.

The estate and the son do have adverse interests in this case. Though the son is executor of Mr. Stoltz's will, the will leaves the residue of the estate to First National Bank in Little Rock as trustee of a trust for about fifteen different parties. If anyone had the understanding these policy funds would pass to such trust, particularly if no other

significant assets pass to the trust, further inquiry may be forthcoming from the Trustee or beneficiaries of the trust.

The advantage of interpleader or reformation actions is that contract actions by other parties should be cut off. However, this may have no effect on negligence actions and would alert all parties to the problem. John Peace is preparing a memorandum on this aspect of the case.

If payment was made to the son, an indemnity agreement from him could reduce exposure. The indemnity agreement would be broadly drawn. Exposure to a negligence suit by the estate if the intent of the insured was found to be to leave the proceeds of the policy to the estate and trust established in the will would still exist.

I.R.S. PROBLEM: We do not know whether more taxes would be due if proceeds are paid to the beneficiary or to the estate. It is possible, for example, that the I.R.S. might take the position the proceeds were payable to the estate if more taxes would be due than if paid to the son. We mention this only to raise the question as an item for consideration.

REINSURER: Since a substantial amount of the proceeds are from reinsurance, the question arises should the situation be discussed with the reinsurer. We mention this aspect only to make sure all important items are considered.

$50,000 POLICY: A review of the $50,000 Flex 79 whole life policy originally issued in the same manner as the $1,950,000 policy indicates that no ownership change form was executed regarding it in March, 1976, a beneficiary change only being signed, naming the son as beneficiary. When the August 1976 changes were made, instead of a new policy page being typed the phrase "and Flex 79 Trust" was added as "The Insured" in the ownership blank, but no change was noted as to the beneficiary des-

ignation of "The Estate of the Insured." Any beneficiary change rider which may have been present was apparently removed at that time.

On this basis, the analysis of the situation on this policy would be the same as for the $1,950,000 policy.

SUMMARY: There is a substantial risk whether payment is made to the son or to the estate.

(a) There appears less risk if payment is made to the son since those involved seem sure he was the intended beneficiary.

(b) There appears more risk if payment is made to the estate because of the insured's apparent intent to benefit the son.

(c) In either event, exposure could be reduced by requiring an indemnity agreement from either the son or the estate.

(d) An interpleader action is probably the safest course. However, the Company could be exposed to a suit from the loser, i.e. the son or the estate. Therefore, this alternative is not a complete solution either.

APPENDIX 2

January 12, 1993

Charles Phillip Boyd, Jr.
Davidson Law Firm, Ltd.
P. 0. Box 1300
Little Rock, AR 72203

Dear Charlie;

I am writing to inform you of some very upsetting rumors I have heard in the last couple of weeks.

I was told that Chief Justice Holt has a very close personal relationship with members of the Friday Law Firm. I heard from a reliable source that he has been quail hunting in Mayflower on Mr. Friday's land and went on a hunting excursion in Texas on Mr. Friday's plane. Charlie, if these rumors are true I would think this relationship could possibly affect Judge Holt's opinion in our case. I feel this is terribly wrong and unethical.

Charlie, as you well know I have felt very strong about the way the Friday Firm handled my dad's estate. I still feel they played a major role and are at the root of many of our problems today. Judge Holt, I would think, would be well aware of the Friday Firm's possible exposure in this case if he read the transcript. Also you may recall during your oral argument in front of the Supreme Court that one of the judges pointed out the Friday Firm's possible exposure.

Charlie, I'm not a lawyer but I would think that if these rumors are true Judge Holt should have stepped down from this case just like Judge Dudley. At the very least, ethically he should have disclosed this conflict.

On behalf of myself and as special administrator for the estate I want you to investigate these rumors immediately

and see if there is any validity to them and notify me of my legal options.

Sincerely,

/s/ Mike

Mike Stoltz

APPENDIX 3

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY
APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased
APPELLEE

PETITION AND BRIEF FOR REHEARING

This Court's Opinion contradicts and/or ignores the sworn testimony of the witnesses who testified, under oath, before a jury, in these proceedings, the documents introduced into evidence, and the law read to the jury by way of Instructions without objection. The Court's Opinion contravenes universal law by holding that knowledge (assuming arguendo that same exists here) obtained by a distant heir, and a potential stranger to the Estate, somehow constitutes notice to the Estate, and its minor children, of their rights and obligations, thereby violating the Fourteenth Amendment to the U.S. Constitution. The Appellee's counsel certifies his belief that this Petition has merit, and is not filed for the purpose of delay.

I

FACTS

First Pyramid Life Insurance Company (FPL) wrote a policy of life insurance totalling $2 Million on the life of J.P. Stoltz. The contractually designated beneficiary was

his Estate. (R.3690) There was conflicting evidence regarding whether the deceased insured wanted his eldest son, or his Estate, to be the beneficiary, but as a matter of contract, on paper, in black and white, the Estate was the designated beneficiary.

The Defendant insurance company saw it had a problem when the insured died due to the manner in which it had handled its paper work. It called in its attorneys for advice on what it should do.

Both of its attorneys recognized the beneficiary discrepancy, and advised it that interpleading the money was the safest course of action to take, but that said action would "alert" the losing party to its potential claim, and could subject, or expose, the insurance company to a lawsuit from the loser. (R.4540-4) This "discrepancy in the proper beneficiary" was not, at any time, passed on to the Estate by the insurance company. (R.3949, 3959-60)

On the same date it received these Memos from its attorneys, the insurance company allegedly had a meeting, wherein the alternative of interpleading the money, and its concurrent exposure to a lawsuit by the loser, was discussed. The insurance company decided to pay the son, *because he was the only one who had made a claim for the proceeds, and was the only one who thought he had a claim to the proceeds.* (R.4354-55) The Estate was never told it had a potential claim to the proceeds. The insurance company decided that, if it was subject to being sued by the loser if it alerted all parties to their potential claim, it would be better off to pay the son, who knew he had a claim, and had made a claim, and take its chances that the other entity with a claim to the proceeds, i.e. the Estate, would never find out about same.

The Estate had numerous debts, and was involved in a procedural morass that could last decades based on the Will of the deceased. First National Bank was the Estate's largest creditor, and was also the Trustee of the Trust to

which these proceeds would have passed had the Estate been paid. Paying the money to the son, in addition to the aforementioned motivational factor, would potentially keep the money out of the Estate, and, if the Bank required Steve Stoltz to sign a personal guarantee insuring a $1.62 Million debt, for which Polyvend stock was pledged, it could assure itself of being paid. Steve Stoltz would see this debt was paid off, because the alternative was selling a multimillion dollar company, Polyvend, which was his if he could run it for ten (10) years. If he sold the company within a ten (10) year period of time from his Father's death, he would have to split the excess surplus with his Brothers and Sisters. Furthermore, Herbert Thomas, *the owner of FPL and the largest stockholder of the Bank,* would have a way of ensuring that the Bank's debt was paid.

The Friday Law Firm represented J.P. Stoltz while alive, Steve Stoltz as Executor of the Estate, Steve Stoltz individually, First National Bank as the largest creditor of the Estate, First National Bank as the Trustee to which these proceeds would have flowed had the Estate been paid, the Defendant insurance company itself, Polyvend Corporation, and the insurance agency which sold the policy to the deceased, at all pertinent times. (R.3891/3907) Herbert Thomas, who owned the insurance company, was the largest stockholder of the Bank. Buddy Sutton, one of the senior partners of the Friday Law Firm, was on the Board of Directors of the insurance company. Herschel Friday was on the Board of the Bank. (R.3947-48) In addition to the aforementioned reasons, theinsurance company, and the Friday Firm, would rather Steve Stoltz be paid than the Estate because it is much easier to control and manipulate one twenty-five (25) year old man to their mutual advantage than it is an Estate comprised of numerous individuals and entities (both local and national), Banks, Trusts, Probate proceedings, litigation, etc. Within six (6) days after paying Steve Stoltz the proceeds, he

bought $3,000,000 worth of insurance from FPL, and arranged the purchase of large FPL policies for two of the employees of Polyvend, the corporation he took over from his Father. (R.4413-15, 4804-05)

The IRS included the $2 Million worth of insurance proceeds in the deceased's Estate. The Estate paid the tax on money it did not receive. The Friday Law Firm sued the IRS for a refund on behalf of the Estate. During this period of time, if not before, the Friday Firm saw FPL's files. They tendered to the IRS certain FPL files regarding these policies, but whited out certain portions. The IRS ultimately settled the case for almost what it claimed in the first place, and told the Estate, through the Friday Firm, that it had whited out certain portions of these files, and that the Estate never did prove that it was not in fact the proper beneficiaries of these policies. The Friday Firm was legal counsel for the insurance company also at this time, and had members on its board. These actions were done to protect First Pyramid as much as to benefit the Estate.

There is conflicting evidence regarding whether or not Steve Stoltz was ever told of the Estate's potential claim to these proceeds. A letter from James Saxton dated June 7, 1983 tells him the Estate has a potential claim, but also tells Steve Stoltz, as Executor and individually, that he has not reviewed the entire insurance company file. James Saxton and Steve Stoltz both testified at trial that neither Steve Stoltz, nor James Saxton, ever apprised the Estate that it had a potential claim because James Saxton was of the opinion Steve Stoltz was the proper beneficiary. (R.4799) Unequivocably, no one else in the Estate was ever told by FPL it had a potential claim to these proceeds. (Regardless, FPL did not submit a *single* limitations Instruction, *never* told the jury it had a normal five (5) year statute of limitations, nor that notice to an attorney is, absent a conflict, notice to the client, thus bringing about a "conflict" instruction from the Plaintiff. So, what dif-

ference should all this make? This Court addresses same in its Opinion so it is cursorily discussed here.)

No distributions of any kind have been made in this Estate, and said Estate is subject to numerous lawsuits filed in the Chancery and Probate Courts of Faulkner County. (R.4603) The First National Bank of Little Rock would have pursued this matter on behalf of the Estate had it been told the Estate had any potential claim to these proceeds. (R.3950-53) The attorneys for FPL advised it of said Trustee's probable actions if it were apprised of the Estate's claim, and yet neglected to apprise the Estate of same. Furthermore, FPL was apprised of the conflicts of interest between the son receiving this money individually, and serving as Executor of the Estate, prior to paying the money. (R.4548-49)The son was required to sign an Indemnity Agreement when he received these proceeds. The only time FPL had an individual sign an Indemnity Agreement was when it was afraid someone else had a claim to the policy proceeds, and wanted to reduce its exposure. (R.4354-55, 4544-45)

Sometime around September of 1987, several members of the Estate began to question the way the Estate was being managed by the Friday Law Firm and Steve, whom said firm was "advising" individually. They secured the services of new attorneys to assist them in investigating the Estate, and were apprised, for the first time, on August 8, 1988, that the Estate had a potential claim to these proceeds, or that Steve Stoltz had been paid instead of the Estate. (R.3864-67) They were in shock, and felt like they had been lied to. (R.4593-96) This is the first knowledge the majority of the members of the Estate had that the Estate was *ever* the beneficiary of these policies. An elderly Aunt and Uncle testified they had been told that the Estate was the beneficiary prior to the insured's death. However, they had never been told the Estate *had not been paid*, and, despite reasonable diligence and viligence, were not apprised of same prior to August 8, 1988.

(R.4844//859) This Aunt and Uncle thought the Friday Firm was looking out for their best interest, and, being as *no* property had passed through the Estate to the heirs and beneficiaries, had no reason to suspect that they would not receive whatever money they had coming, along with the other heirs and beneficiaries, at the time the Estate's property was distributed.

The Last Will and Testament of the deceased indicates that the nine (9) Brothers and Sisters, the aforementioned Aunt and Uncle, Hendrix College, and St. Joseph Catholic Church were to receive the income from the property of the Residuary Trust, i.e. these insurance proceeds, as long as the heirs and beneficiaries lived. Upon the death of the last heir/beneficiary, the corpus of the Trust was to pass to St. Joseph and Hendrix College. Thus, the elderly Aunt and Uncle were only supposed to receive a pro rata split, along with eleven (11) or so other individuals/ entities, during their life time. (D.'s Exh. 149) The jury inferred, as the law allows them to do, and as anyone using common sense would, that the income from the life insurance policies was not that big a deal. Being lied to was.

A lawsuit was filed on April 20, 1989. A Pulaski County jury found the Estate was the contractually designated beneficiary, and rendered a verdict on same. The record indicates the Trial Court complimented the jury throughout the trial on its attentiveness. The Supreme Court has the obligation to give deference to this fact.

Regardless of how this Court views the evidence, *no one* can state that the foregoing dissertation of *facts* is not a reasonable conclusion by a reasonable jury, and supported by substantial evidence. This Court may not want this to be the result, may not want the jury to have found this way, may not think the decision was right (although no one who sat through the trial and viewed same in an impartial manner could possibly hold otherwise), but, nevertheless, unless it totally disregards the sworn testi-

mony of the warm bodies who took the witness stand in front of the jury,and the documents from FPL's own file, it must uphold this verdict. To hold otherwise, would make our jury system a sham. Why not just submit Affidavits to the Supreme Court and allow it to decide the facts, the law, and the decision? That is strong language from the Appellee. But, he has the transcribed record in his possession to back him up, and will stand, flat footed and entrenched, upon same. (See Abstract of testimony attached to Brief in Support of Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition For Rehearing, filed January 18, 1993.)

II

APPLICABLE LAW

This Court knows the law when viewing a jury verdict on Appeal. If there is any substantial evidence to support the jury verdict, same is not disturbed. The evidence is viewed in the light most favorable to the party in whose favor said verdict rests. This Court does not weigh the facts for the purpose of determining in whose favor the preponderance of the evidence lies. *Kratzkev Nestle v. Beich, Inc.*, 307 Ark. 158, 817 S.W.2d 889 (1991); *Missouri Pacific Railroad Co. v. Clark*, 246 Ark. 824, 440 S.W.2d 198 (1969). The reviewing Court cannot disturb the jury's conclusion as to substantiality of the evidence unless there is no reasonable probability in favor of the Appellee's version, and then only after giving legitimate effect to all presumptions in favor of the jury's findings. The jury is the sole judge of the credibility of the witnesses. *Beard v. Coggis*, 249 Ark. 518, 459 S.W.2d 791 (1970); *Bradbury v. Gower*, 247 Ark. 704, 447 S.W.2d 247 (1969).

Fraud, or fraudulent concealment that will toll the statute of limitations, is a question of fact that can be inferred from the evidence, just as any other fact. *Moore Ford Co.*

v. Smith, 270 Ark 340, 604 S.W.2d 943 (1980). Court's Instruction No. and 9. (R. 4875/4878) The question of fraudulent concealment, and the concurrent tolling of the statute of limitations, is a fact question judicially recognized as such by this Court for decades. *Crossett Health Center v. Crowell*, 221 Ark. 874, 256 S.W.2d 548 (1983); *Schenebeck v. Sterling Drug Co., Inc.*, 423 F.2d 989 (8th Cir. 1970); *Mulligan v. Lederle Laboratories*, 786 F.2d 859 (8th Cir. 1986); *Robinson v. White*, 633 F.Supp. 954 (W.D. Ark. 1986).

For reasons that will be gone into in greater detail later, the Appellee is convinced no one on this Court carefully read the entire record of these proceedings. In fact, the attorney for the Appellee has been told by a member of the Court that this Court generally does not read the record itself because of the time constraints involved, and because it is not going to overturn questions of fact unless same are absolutely, unequivocably, unargumentatively unsupported. The reason for same is that this Court cannot glean the demeanor of the witnesses, their facial expression, their tone of voice, etc. from a cold transcript. The cold hard fact is that there is no conceivable way the six (6) members of this Court assigned to hear this matter, and probably not the Chief Justice himself, had time to read - one time - the entire transcript. Same is probably not necessary if an issue of law is to be decided, and *that* is what this Court is supposed to do. But, it is inconceivable this Court can properly overturn a question of fact when it was not present in the Courtroom along with the Trial Judge, live witnesses, a jury, and numerous other individuals. Furthermore, how can this Court, in discharging its obligations to the people of the State of Arkansas, overturn a question of fact when it does not even read the transcript? A reading of the Abstract, regardless of how well it,s done, is simply insufficient.

The undersigned knows that one of the three volumes of testimony from witnesses, including witnesses whose

testimony is taken out of context by this Court, was actually misplaced. The Appellee wonders when and where it was misplaced, and how it was found. Obviously, no one can read a transcript that cannot be located. The Court does follow the "inferences" advocated by the *Appellant* in its Opinion. There was ample other testimony contained in this volume to counter any such inference, were the testimony from all witnesses read, and all *inferences* from said testimony read in the light most favorable to the *Appellee.*

This Court is an Appellate and is supposed to review and decide issues of law. What is the issue of law advanced on Appeal that merits a reversal of this jury's verdict? The verdict is sound unless this Court chooses to overturn a question of fact supported by ample evidence, or chooses to simply state, in a manner that is clearly erroneous, that "no" such evidence exists. The record indicates the truth is to the contrary. (See also Instructions Nos. 12 and 14, where the jury had to find fraud and conduct warranting punitive damages because same were awarded.) (R.4878-80) Instruction No. 8 was given to the jury without objection. (R. 4877-78) In fact, the last sentence was added to same by defense counsel himself! This Instruction makes fraud, fraudulent concealment, and a concurrent tolling of the statute of limitations, a factual issue. With no objection to the presentation of this Instruction to the jury, the jury's finding becomes the "law of the case." The jury had to find the Estate was the beneficiary, to find for the Plaintiff in the first place. See also Instruction No. 12. (R.4878) Hence the insurance company had the affirmative obligation to speak, and by its silence is guilty of fraud and the tolling of the statute of limitations. This Court is substituting its view of the evidence to support the decision reached in its Opinion, in the face of compelling legal and factual precedent that dictates otherwise. Same is improper. *Metropolitan Life Insurance Co. v. Williams*, 197 Ark. 883, 125 S.W.2d 441 (1935).

This Court quotes the Trial Court's "Findings of Fact" on pg. 7 of its Opinion, and states that to prove fraud, the Plaintiff must show:

> Overt acts caused the legal right to be hidden . . . or there existed a specific legal relationship between the parties that obligated an overt disclosure . . .,

and agreed with said analysis. The aforementioned Jury Instruction makes this a closed issue. If the Estate was the beneficiary as the *Defendant itself* told the jury, the insurance company had the affirmative obligation to seek out the Estate, notify the skilled fiduciaries and Trustees at First National Bank, interplead the money to alert the Estate and the attorneys for these minor children, notify the Probate Court of Faulkner County that said proceeds should be payable to the Estate, . . . Doing nothing is fraud. It cannot sit back and wait on an Aunt and Uncle to file a lawsuit. It has an *affirmative obligation to speak.* We don't have to worry about the "legal relationships between the parties." *Camp v. First Federal Savings and Loan*, 12 Ark. App. 156, 71 S.W.2d 213 (1984).

These facts, coupled with the Instructions, coupled with the fact that the insurance company submitted *no* Instruction, whatsoever, even telling the jury it had a statute of limitations defense, effectively prevents the Defendant from raising this issue on Appeal. When a party requests, or acquiesces in, an Instruction submitting particular issues to the jury, that party is not entitled to thereafter complain about the jury,s determination of such an issue. *Farmers Coop Assoc. v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970); *Willis v. Elledge*, 242 Ark. 305, 413 S.W.2d 636 (1967). See also *Rule 51* of the *Arkansas Rules of Civil Procedure.* If a party does not proffer a Jury Instruction embodying and articulating his theory and all defenses, the failure to do so constitutes a waiver. *Dodson Creek. Inc. v. Fred Walter Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947, 952 (1981). The failure to object to an

Instruction bars a party from raising the applicability of the doctrine espoused in same on Appeal. *Northland Aluminum Products, Inc. v. Creative Cookware. Inc.*, 678 F.2d 746 (1982); *Rowe International, Inc. v. J.B. Enterprises' Inc.*, 647 F.2d 830 (8th Cir. 1991). It doesn't matter that the party moved for a Directed Verdict, or that it wants to hang its hat on the issue being a matter of law. It *has* to object to the Instruction being given to the jury, or said objection is waived. Absent same, the Jury Instruction, the jury's finding, is the law of the case.

(b) NOTICE TO RITA FIELDS AND JACK SMITH

This Court mistakenly states that even if fraud is present, same is somehow cured because two (2) elderly individuals, one an heir of the Estate, and one a possible heir, who may have gotten l/llth of the income off of the interest from these proceeds during their limited lifetime, had knowledge the Estate was the beneficiary of these life insurance policies, and saw financial statements indicating same, prior to the insured's death.

In the first place, it has been the rule of law in Arkansas *for more than a century* that any claim on behalf of the Estate must be brought by the Executor of Administrator of the Estate. *Whelan v. Edwards*, 31 Ark. 723 (1877). The Defendant itself moved for Summary Judgment because the heirs of the Estate were attempting to bring a cause of action to recover these insurance proceeds instead of the Executor. J. Michael Stoltz had to be appointed Special Executor to proceed forward in this lawsuit. Isn't there a clique, somewhere that states what's good for the goose is good for the gander?

The Estate is an entity in and of itself. Only the Executor, or one appointed Special Executor, can receive "Notice" that can bind the Estate. A.C.A. # 28-1-112. The United States Supreme Court has held that any creditor of the Estate must be given specific and actual notice if

their identity is "reasonably ascertainable," and that to take one,s property without providing same violates the due process clause of the Fourteenth Amendment of the United States Constitution. *Tulsa Professional Collection Services, Inc. v. Polk,* 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 2d 565 (1988); citing *Mellane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 Sup.Ct. 652, 94 L.Ed. 865 (1950) and *Menonite Board of Missouri v. Adams,* 462 U.S. 791, 103 Sup.Ct. 2706, 77 L.Ed.2d 180 (1983).

Taking this one step further, and assuming for purposes of argument that the Aunt and Uncle had notice, which is debatable, and that the Uncle by marriage even had a *claim*, which is *unlikely*, no one, not this Court's law clerks nor opposing counsel, will find a case that holds that notice to an elderly Aunt and Uncle under these circumstances will bind the other children, especially minor children, that make up the Estate. They testified in rebuttal only to counter the Defendant's contention that the deceased's intention was to designate the son as beneficiary and alleged comments by him verifying same prior to death. This evidence was not even presented, as the Opinion would read, in the Defendant's case in chief. Perhaps the Aunt and Uncle cannot receive their share of the income, but that issue should be determined in Probate Court after a thorough trial.

This Court has mistakenly cited an untenable basis for erasing a potential $10 Million Judgment, without citing any case law, precedent, statutory authority, etc. The leading treatise on Estates, *Page on Wills*, 2639, 2642, cites Arkansas cases and states the following when dealing with probate law and an Estate:

> Notice must be served upon the persons who are specified in the statute which regulate notice. The contents of the citation or notice must conform to the requirements of the statute. Without express authority, the entrance of appearance by one heir does not

enter an appearance for another heir. *Id.*, pgs. 87, 88, and 92.

The Arkansas case of *Sowell v. Housman*, 207 Ark. 929, 183 S.W.2d 511 (1944) is cited as being in conformance with the aforementioned, horn book rules of law. See also *Matter of Lacy's Estate,* 126 Cal. Rptr 432, 54 Cal.App. 3rd 172 (1975) and *Hesthagen v. Harby,* 78 Wash.2d 934, 481 P.2d 438 (1971). These cases are not exactly on point, but the analogy is clear. The Estate is an entity that can only be bound by notice, in the statutorily described manner, to the Executor or Administrator.

Furthermore, the Defendant offered no proof on the age of these minor children at all pertinent times, much less whether they were incapacitated or incompetent for some other reason. It had the burden of proof on the issue of limitations; said burden does not shift to the Plaintiff because it is obvious from the record we are dealing with minor children. Notice to a minor, by statute, must go through a Guardian. See A.C.A. § 28-65-101, et seq.

Finally, Lewis Mathis, the attorney for the Friday Firm, berated and ridiculed the balance sheets in question in his testimony as bogus, and said that *everyone* knew the deceased put what he thought his bankers wanted to see on said documents.

In sum and substance, whether or not Rita Fields and Jack Smith used due diligence is a question of fact, judicially recognized as such, for the jury. This Court's fall back position is simply untenable.

This Court's Opinion is directly contrary to long established rules of law pertaining to insurance companies and their obligations to those they deal with. For that reason, same must be gone into in this pleading.

III

GENERAL RULES OF LAW

The law is clear, in every jurisdiction, that in every contract, including a policy of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other party to receive the benefits of the agreement. *Merritt v. J.A. Stafford Co.*, 440 P.2d 927 (1968); *Couch on Insurance* 2d, § 15:25. Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. A relationship of trust and confidence between the insurer and insured, as distinguished from the existence of a formal trust, is recognized by Courts and is used by Courts to prohibit the insurance company from practicing fraud or a misrepresentation. *Id.* at § 23:12.

The law is equally clear, and recognized in all jurisdictions, that where fraud is involved the time period within which a beneficiary must sue commences to run only from the date of the discovery of the fraud, or when "the fraud" might with reasonable diligence have been discovered, *Id.* at 75:107. If the person injured:

> remains ignorant for a time, the applicable statute of limitations commences to run only from discovery or the date when, with reasonable diligence, there ought to have been a discovery of the facts constituting the fraud. . . *Id.*

As a matter of simple contract law, the Defendant has failed to discharge its contractual obligations. When the insurer makes payment of the proceeds of insurance to the *rightful beneficiary,* such payment is a discharge of the liability of the insurer. *Id.*, 27:176. However,

> the payment of the proceeds of insurance to the wrong person by an insurer does not relieve it of its liability to the proper beneficiary, whether

> the payment is improper because made to a substituted beneficiary where there was no legally effective change of beneficiary, or because made to the original beneficiary where there had been an effective change of beneficiary. *Id.* at § 27:177.

If the insurer knows of potential adverse claims to the insurance proceeds, and chooses to pay any one of the claimants, it acts under the risk that the recipient selected by it is the one who is lawfully entitled thereto. *Id.* at § 27:178. The rightful beneficiary can sue the wrongful recipient, but this does not relieve the insurer of its liability to the correct beneficiary. *Id.* at § 27:179. *Appleman on Insurance*, 1098, echoes these principles and cites the Arkansas Supreme Court case of *Sovereign Camp. Woodmen of the World v. Israel*, 117 Ark. 121, 173 S.W.2d 855 (1915) in support of same.

If the insured does not know of the existence of the insurance contract, or know that he is a named beneficiary under same, he will not be barred by limitations for failing to pursue a claim within the standard statutory time frame. *Couch on Insurance* 2d. § 75:175. *Thompson v. Equitable Life Assurance Society*, 298 A.2d 422 (1974).

The fact that fraud and fraudulent concealment will toll the applicable statute of limitations on a beneficiary bringing a cause of action on their life insurance policy is spelled out in greater detail at § 75:210.

> Fraud of an insured tolls the limitation on a right of action whether *statutory or contractual*, and the limitation becomes effective only from discovery or from the date when, with reasonable diligence, there ought to have been discovery. (emphasis added) citing *Firemen's Insurance Co. v. Jones*, 245 Ark 179, 431 S.W.2d 728 (1968).
>
> If by any act of concealment or deceit the wrongdoer hides from the innocent party the facts which would

> put him upon inquiry, the contractual limitation or statute does not begin to run.
>
> Fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong and the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud.

Perhaps the Arkansas Supreme Court case of *Metropolitan Life Insurance Co. v. Williams*, 197 Ark. 883, 125 S.W.2d 441 (1935) provides us with the best synopsis of Arkansas law in regard to deciding the issues at hand. The fact situation of *Williams* is extremely complicated and convoluted, but suffice it to say that in September of 1923 an insured under a life insurance policy disappeared. The Plaintiff and beneficiaries in *Williams* did not file her lawsuit until September 28, 1931. The insurance company pled limitations as a complete bar, and the Plaintiff alleged fraud and fraudulent concealment against the insurance company to defeat same. The Arkansas Supreme Court stated;

> It is a general rule that where one has deceived another or where, through *active wrong or NEGLIGENCE,* misleads another and causes him not to file suit, the statute is tolled or suspended until it is discovered that the representations were false. If a Defendant intentionally *or NEGLIGENTLY* misleads a Plaintiff by his representations and causes him to delay until the statutory bar has fallen, the Defendant will be estopped from pleading the statute of limitations. (emphasis added) *Id.* at 448.

Cases too numerous to cite stand for the proposition that an insurance policy is governed by contract law. The

Court of Appeals in *Rice v. McKinley*, 267 Ark. 659, 590 S.W.2d 305 (1979) provides us with further insight on exceptions to a strict enforcement of a statute of limitations to bar a Plaintiff,s Complaint. In *Rice*, a contract was entered into between the parties in February of 1968. A suit was filed by the Plaintiff on January 28, 1976, and the Defendant raised the statute of limitations and laches as a defense. The Court of Appeals held:

> The error of Appellant's position is that the period of limitations runs from the point at which the cause of action accrues rather from the date of the agreement. . .
>
> Where the parties have entered into an agreement which requires a series of mutual acts, some unilateral, some bilateral in character and have left the time of those acts open ended, and where one contrives to receive the benefits of the agreement . . .the cause of action does not accrue until one party has by word or conduct indicated to the other a repudiation of the agreement. . . ..
>
> If a right of action depends upon some contingency or a condition precedent, the cause of action does not accrue and the statute of limitations does not begin to run until that contingency occurs or the condition precent is complied with. *Id.* at 307-308.

The recent case of *Chadwell v. E.T. Pannell*, 27 Ark App. 590, 776 S.W.2d 38 (1989) echoes these principles and cites *Rice, supra*, as pursuasive authority. The Court in *Chadwell* furthermore stated that the statute of limitations is *not* favored by the law. Under circumstances similar to those that existed in *Rice*. the Court held that:

> Under these circumstances, *the date the limitations began to run is a question of fact*. Where a question of fact remains to be solved, the granting of summary

judgment is inappropriate. . . *Id.* at 41. (emphasis added)

In *Bowler v. Fidelity & Casualty Company of New York,* 250 A.2d 580 (N.J. 1969), the Supreme Court of New Jersey reversed a lower Court's ruling that a Claimant's right to pursue insurance benefits was barred by the applicable statute of limitations. The insurance company had failed to make payments due the insured under a policy of insurance, and, *through its silence.* had induced the insured not to file a lawsuit within the applicable statute of limitations. The quoted pertinent parts of the Court,s decision read as follows:

> [An insurance company's] position requires the assumption of a stern obligation toward people who purchase their contracts. Simply described the obligations is that of fair dealing. . .Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. Good faith demands that the insurer deal with laymen as laymen and not as experts in the subtleties of law and underwriting . . . There is an implied covenant of good faith and fair dealing that the insurer will not do anything to injure the right of its policy holder to receive the benefits of its contract. This covenant goes deeper than the mere surface of the writing. When a loss occurs which because of its expertise the insurer knows or should know is within the coverage, and the dealings between the parties reasonably put the company on notice that the insured relies upon its integrity, fairness and honesty of purpose, and expects his right to payment to be considered, the obligation to deal with him takes on the highest burden of good faith. (cases cited)
>
> *In situations where . . . the uninformed insured might be inclined to be quiescent about the disregard of nonpayment of his claim and not to press it in timely*

fashion, the company cannot ignore its obligation. It cannot hide behind the insured's ignorance of the law; it cannot conceal its liability. In these circumstances it has the duty to speak and disclose, and to act in accordance with its contractual undertaking. The slightest evidence of deception or overreaching will bar reliance upon time limitations for prosecution of the claim. (emphasis added)

More specifically, in a situation such as that present here, *if all or part of the benefits provided by the policy clearly is due, the insurer must make the payment. If it fails to do so. and the statute of limitations or a policy limitation intervenes before suit is started, it will be estopped to plead the limitation in avoidance of a trial on the merits of the claim.* Further, if the insurer has factual information in its possession substantially supporting the policyholder's right to benefits, but it has a reasonable doubt as to whether the evidence is sufficient to require payment, *the obligation to exercise good faith*, upon which it knows or should know the insured is relying, *cannot be satisfied by silence or in action. It must notify the insured of its decision not to pay his claim.* But mere naked rejection would not be sufficient. The giving of such notice should be accompanied by a full and fair statement of the reasons for its decision not to pay the benefits, and by a clear statement that if the insured wishes to enforce his claim *it will be necessary for him to obtain the services of an attorney and institute a court action within the appropriate time. The "appropriate time" means the time remaining under the policy or the applicable statute of limitations within which the suit must be brought. Failure on the insurer's part to follow such a course. will bar reliance on the statute of limitations or a time restriction on court action expressed in the policy.*

Failure to make this payment constitutes conduct incompatible with the insurer,s obligation to exercise good faith in dealing with its insured, and *of itself* creates an *equitable estoppel* against the plea of the statute of *limitations*. (emphasis the Court's)

We regard the company,s cessation of payments and its unexplained avoidance of its contractual obligation as so inequitable and unconscionable as to bar reliance upon the statutory limitation on the institution of suit on the policy. *Such conduct cannot be permitted to support a technical defense which would avoid a decision on the merits. enforce a forfeiture and bestow on the carrier a shockingly unfair advantage.* (cases cited)

When claims are honestly made *care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits. Under the circumstances it would be a perversion of the policy of the statute of limitation to deny a trial on the merits.*

There is no need to make fine distinctions as to the persons who owe a duty to disclose. It is likewise unnecessary to dwell upon the contention that the insurer's duty of good faith to its insured arises at the time of contracting and persists throughout the period when premiums are paid and no return is sought, but that when a loss occurs and the insured seeks to obtain the compensation provided in the contract, the parties deal at arm,s length. *It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.* (emphasis added)

> Although none of the cases cited immediately above involved precisely the issue presented here, in our view all of them point in the direction of the result we consider just. It would be a reproach to the law if there were no means of avoiding the unjust result the company seeks to impose upon the insured. *Id.* at 587-90.

Courts have gone to extraordinary lengths to prevent a party from preventing the trial of a cause on the merits by invoking the statute of limitations, when the party seeking to invoke the defense had a superior means of acquiring knowledge relative to the contract, and the mechanics behind which said contract was to be enforced. *W.V. Pangborn v. N.J. Dot*, 552 A.2d 222 (N.J. 1989).

The case of *Davis v. Blue Cross of Northern California*, 600 P.2d 1060 (1979) is discussed at length in *Sarchett v. Blue Shield of California*, 729 P.2d 267 (1987) and provides a useful precedent for the Court in the case at bar:

> The insurer's implied duty of good faith and fair dealing includes a responsibility to inform its insureds of their rights under the policies. . .Failure to inform its insureds of the policies . . . provisions amounted to an *implied misrepresentation.* (emphasis the Court's)
>
> *Blue Cross* ignores the special nature of the insurer-insured relationship and the resultant duties which an insurer owes to its insureds. (cases cited) Among those duties, we stated, is the duty of each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement. Thus, [the insurer] . . . must give at least as much consideration to the [insured's] interest as it does to its own. One important facet of the insurer's obligation to give the insured's interest as much consideration . . .as it does. . .its own is the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. *In particular, in*

> *situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer has been required to bring to the insured' attention relevant information so as to enable the insured to take action to secure rights afforded by the policy.*
>
> *The duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights.* (emphasis added) *Id.* at 276-77.

Arkansas recognizes the first party tort of bad faith, *Aetna Casualty & Surety Co. v. Broadway Arms,* 281 Ark. 128, 664 S.W.2d 463 (1984). However, even jurisdictions which do not hold that an insured has a cause of action for bad faith recognize that there is an "implied covenant of good faith" in every insurance contract that is "the essence of what the insured has bargained and paid for, and the insurer has the obligation to perform them. *Beck v. Farmers Insurance Exchange,* 701 P.2d 795, 801 (Ut. 1985). Whether or not an insurance company has fulfilled this duty and obligation is *a question of fact for a jury. Id.*

The Supreme Court of the State of Tennessee has held that an insurance company's obligation under the contract to deal "fairly and in good faith" goes beyond only those duties "specifically spelled out in the contract drawn by the insurer." *MFA Mutual Insurance Company v. Flint,* 574.S.W.2d 718, 720 (Tn. 1978).

Federal Courts interpreting Arkansas law have held that an insurance company must exercise "reasonable care" when determining whether to pay a claim, to whom, and for what amount. Whether reasonable care was exercised is *always* a question of fact for the jury. *McChristian v.*

State Farm Mutual Automobile Ins. Co., 304 F. Supp. 748 (W.D. Ark. 1969)

Thus, as this Court can see, insurance companies do have a duty to pay the proceeds to the proper party, and to apprise any beneficiary of their *potential* rights, and offer an explanation to said beneficiary when the insurance company is unsure whether it owes an obligation or not and fails to pay said obligation. The case at bar is not the first time the situation has arisen, and Courts have uniformly held that the insurance company cannot rely upon a procedural defense to bar a trial on the merits, when the potential Plaintiff failed to pursue a cause of action within the applicable statute of limitations period because of the insurance company's *silence*.

III

ERRONEOUS STATEMENTS CONTAINED IN THE SUPREME COURT'S OPINION

Finally, the following specifics are advanced in further support of the Appellee's view the record in these proceedings was not read carefully.

> Supreme Court Opinion: Mr. Horn concluded. . .that Steve Stoltz was the 'legal' beneficiary and [concluded in an] executive meeting with FPL approximately one week later. . .that paying the son 'without interpleader' was 'the best course.' (See Opinion pg. 3)

Facts: Mr. Horn told the insurance company to interplead the money, that this was the *safest* course to take, that this would *alert* the Estate to its potential claim, that the Estate had a potential claim, and that interpleading the money would expose the insurance company to a suit from the loser. The "executive meeting" to which this Court refers occurred the *SAME DAY* (not a week later) as the Memo from Mr. Horn telling his client to interplead the

money. The words "legal beneficiary" and "the best course" are contained in Defendant's Exh. 20, or the handwritten Memorandum dated the same day and directly contradictory to Mr. Horn's Memo, *from an individual in the Claims Department of the Defendant.* The fact that the Memo from Mr. Horn, and this bogus Memo from the insurance company are dated the same day, and also contradictory, was adequately pressed at the trial of this matter and show the subtleties from which fraud may be inferred. All third parties testified that had they known that neither the Estate nor Steve Stoltz knew of the discrepancies in the beneficiary, they would have notified him of this because that was "the only honest thing to do."

> The Court's Opinion: This dispute with the IRS arose because of a [gift tax] provision, if a gift is made within three (3) years of the decedent's death. (See Opinion pg. 3)

Facts: The IRS agent investigating this matter told the Friday Firm that, although the money was paid to the son, there was and is a valid issue regarding whether or not the Estate is the proper beneficiary, and noted the fact that the Estate,s attorneys, *who were also representing the insurance company itself at that time,* whited out portions of the file and sent it to the IRS.

> The Court's Opinion: In 1983, the attorneys who represented both the Estate and Steve Stoltz requested [the files and they were readily turned over.] 'In all probability' these files would have been turned over to the Estate upon like inquiry. (See Court's Opinion pg. 8)

Facts: The attorneys representing the Estate got the files in 1983, *when they were also representing the Defendant insurance company* itself. Surely, it does not seem ironic to this Court that the attorneys representing the insurance company would have open access to its client's own files, and *said attorneys would protect its client.* In contrast,

the attorneys representing the undersigned's clients filed discovery, and had to have a Court Order to compel the Defendant and the Friday Firm to turn over the material from the insurance company's files to him. On top of speculating to supply facts to support its opinion if the true interaction could not be ascertained, we have an example *in the record* that shows this Court's supposition is wrong.

> The Court's Opinion: In response, First Pyramid denies concealment and asserts the Estate knew or should have known of the change in beneficiaries on the policies. (See Court's Opinion pg. 5)

Query: The undersigned cannot ascertain what this Court means by this statement, as same, except for "denies concealment," has no connection to any position raised by either party on Appeal.

Finally, this Court cites *Atlanta Exploration, Inc. v. Ethyl Corporation*, 301 Ark. 331, 784 S.W.2d 150 (1991) as one of the few cases in its ruling to support its opinion that you must have affirmative and fraudulent acts of concealment. A reading of this case makes it clear that this Court found that said finding is a *question of fact for the jury*.

CONCLUSION

Writing this Brief is a sad day for the undersigned. It is sad because he has to address this Honorable Court in this manner. He has held this Court in the highest esteem, and took an oath before this Court that he takes very seriously. The first thing some people do when they lose is manufacture excuses and shout "sour grapes." Such is not the case here. The undersigned is not a radical or a renegade. He wakes up each morning with both feet on the ground, and has lost cases before he thought he should have won when there were legitimate issues present. Such is not the case here either.

The Appellee won this case before the jury. Every "issue of fact" this Court chooses to change or ignore was presented to the jury. The jury was properly instructed, or, in the alternative, no objections were raised which merit any discussion in this Petition and Brief. The undersigned beat the Appellant at every turn; here buffed every argument, legitimately, factually, and according to the law.

There is substantial evidence to support fraud. It was made a jury question by the Defendant. It is the law of the case. This Court cannot read the Abstract of the Testimony provided as Exh. A to the *Brief in Support of Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition For Rehearing,* and state otherwise.

According to this Court's decision, an insurance company within this State can pay whomever it chooses, or pay no one at all, take no affirmative action whatsoever to alert the rightful beneficiary, wait five years, and be home free. We must all check the obituaries for the preceding five years, and stay "up to date" on deaths from this day forward, in order to make sure we send inquiries to all insurance companies who have paid benefits asking if those benefits really belonged to us. Is that what this Court wants to tell the People of Arkansas? The Appellee, and those he stands for, feel like the families of the victims wronged by the individuals recently set free by acting Governor Jerry Jewell, who acted in spite of the decisions of those respective juries.

The Appellee is asking this Court to have the courage to admit they made a mistake and right the wrong. We have lived by the jury system in this country for years, and this Court's verdict simply states that the decisions of a jury within this State carry no weight whatsoever.

In sum and substance, while the Appellee could see how an adversary, who carries the torch for his client, could

argue in good faith that a factual question *for the jury* is present on the issues pertinent to these proceedings, there is absolutely no way anyone can read the record, view same in the light most favorable to the Appellee, and state the evidence at trial is so one-sided the jury,s verdict, and concurrent findings of fact, can be overturned.

Respectfully submitted,
DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
(501) 374-9977

By: s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage affixed thereon, on this the 22nd day of January, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

APPENDIX 4

SUPREME COURT OF ARKANSAS

No. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA,

APPELLANT

V.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

APPELLEE

Opinion Delivered FEB 15 1993

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, NO. 89-2464.
HON. CHRIS PIAZZA, JUDGE

CONCURRING OPINION.

JACK HOLT, JR., Chief Justice

The appellee, Estate of J.P. Stoltz (hereafter "the Estate"), has filed a petition for rehearing requesting that this court vacate its decision of December 21, 1992, reversing a jury verdict in the Estate's favor. In addition, the appellee has filed a separate motion for "vacatur" praying that all members of this court who participated in this case disqualify themselves from rendering any further decision on the merits of this case and that seven special justices be appointed. The court treated this motion as a Letter of Suggestion of Disqualification, Ark. Sup. Ct. R. 27, since our rules do not provide for a motion for vacatur.

The Estate's Motion for Vacatur is premised upon allegations that I have a social relationship with Mr. Herschel Friday of the Law Firm of Friday, Eldredge & Clark that renders my decision making in this case impaired because of this relationship, that all members of this court should disqualify.The determinative issue in this case is whether the appellee, Estate of J.P. Stoltz, has proven fraudulent concealment on the part of First Pyramid Life Insurance Company in order to toll the statute of limitations on the Estate's claim. In an unanimous decision, the other justices were in agreement that the Estate had not proven fraudulent concealment and that the Estate was not entitled to a judgment in its favor. Neither Mr. Friday nor members of the Friday, Eldredge and Clark firm were parties or counsel to the litigation in question, nor served as attorneys at trial or during this appeal.

No one outside of this court has discussed this case with me during its pendency on appeal. My relationship with Mr. Friday is of no moment. It does not impair my decision making processes in this case. For these reasons, I decline the appellee's suggestion that I disqualify.

APPENDIX 5

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

APPELLEE

MOTION FOR RECONSIDERATION

Comes J. Michael Stoltz, As Special Administrator of the Estate of J.P. Stoltz, Deceased, and for his Motion does state as follows:

1. This Court rendered an Opinion on February 15, 1993 denying the Estate's Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master. If the Court refused to disqualify itself, the Estate requested the appointment of a Special Master to investigate the extent of what is believed to be a close personal friendship between Chief Justice Jack Holt, Jr. and Herschel Friday of the Friday Law Firm, exemplified by Judge Holt being the personal and specific guest of Mr. Friday's on numerous occasions through the years at social outings and functions, including the period of time this matter was pending on Appeal.

2. The Court's Opinion erroneously states that the fact that Judge Holt and Mr. Friday have a "social relationship" is the only basis for his disqualification, and the disqualification of the other members of this Court. The

basis for the Motion to Disqualify is *not* simply that a "social relationship" exists between Mr. Friday and Judge Holt. It is believed that Judge Holt is a regular *guest* of Mr. Friday's on his farm, which is in essence a private hunting resort, in Mayflower, Arkansas, and that other hunting excursions between these individuals transpired while this matter was on Appeal. The Friday Law Firm had a substantial interest in this Court's overturning the jury verdict that had been rendered in these proceedings. By analogy and example, Judge Holt being a regular guest of Mr. Friday on his farm, where pen raised quail are hunted, complete with a hunting lodge that is said to be elaborate and eloquent, is no different than Judge Holt being a routine and regular guest of Mr. Friday's at a ski resort owned by Mr. Friday in Boulder, Colorado, and then Judge Holt writing an Opinion that the Friday Law Firm believes helps exonerate it from further exposure to the Estate in future litigation that is imminent.

3. The Supreme Court's Concurring Opinion does not discuss, much less distinguish, *Johnson v. Sturdivant*, 295 Ark. 622, S.W.2d 415 (1988), nor tell the attorneys and people of the State of Arkansas why the standards laid down by that case applied to Judge John Purtle, but not to Judge Holt.

4. This Court's "Concurring Opinion" states as a basis for the refusal to disqualify that "neither Mr. Friday nor members of the Friday, Eldredge & Clark firm are parties or counsel to the litigation in question, nor served as attorneys at trial or during this Appeal." Said statement ignores, and is directly contrary to, the specific law laid down by the U.S. Supreme Court which states in unequivocable fashion that recusal due to a conflict is not limited to *the parties named in the suit*, or the attorneys representing said parties. *Lilejeberg v. Health Services Acquisition Corporation*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) and *Preston v. U.S.*, 923 F.2d 731 (9th Cir. 1991).

4. The "Concurring Opinion" states that the crux of the issue on Appeal is whether or not fraudulent concealment tolling the statute of limitations had been proven by the Estate is the dispositive issue. This statement indicates to the Estate that this Court has again refused to look at the true issues inherent in this Appeal, or matters raised in the post-Opinion pleadings unequivocably indicating that the "law of this case," as codified in Jury Instruction No. 8 (R.4877-78), given without objection, is that First Pyramid is guilty of fraud which tolled the statute of limitations because the Estate was determined to be the proper beneficiary of the life insurance policies and First Pyramid failed to apprise the Estate of its claim. While the entire record, if reviewed, would indicate that numerous other facts and factors representing fraud are present, no such inquiry is necessary.

5. Judge Holt's statement that no one outside the Court has specifically discussed this matter with him during its pendency on Appeal ignores the legal standard required for recusal. There need be no allegations, or proof, that this case was actually and specifically discussed by other members, specifically Mr. Friday, with Judge Holt. The fact that not only do they have a close personal friendship, but that Judge Holt is a *guest* at Mr. Friday's private hunting resort, and on hunting excursions outside the State of Arkansas, and will undoubtedly continue to be a guest on a regular but intermittent basis in the future, is enough to cause a reasonable man to question Judge Holt's impartiality. That is the standard, not whether or not specific discussions of this case took place. 415 (1988) dictates that the remaining members of this Court disqualify, and that seven (7) special Justices be appointed to hear this matter on its merits.

6. The failure of this Court to appoint a Special Master to investigate the full extent of the personal friendship between Judge Holt and Mr. Friday, and the number of times Judge Holt has been the personal *guest* of Mr. Fri-

day's on his private land, or on out of state leases, to partake in an important recreational activity, amounts to Judge Holt sitting in judgment on himself with no denial that such is the true situation, much less an explanation for why same is not grounds for disqualification. This situation inherently raises the issue which mandated the entire Court's recusal, and articulated in *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415, 416 (1988) as follows: "It is not easy to sit in Judgment of one's self." These events amount to a violation of the 14th Amendment to the United States Constitution, a denial of due process for the Estate, and causes one to seriously question the Estate's ability to receive a fair hearing in these proceedings.

7. Attached hereto as Exh. A is an Affidavit in accordance with Rule 3 of the Rules of the Supreme Court.

WHEREFORE, the Estate respectfully prays that this Court reconsider its "Concurring Opinion," and its refusal to disqualify itself, that this Court not render any additional Opinions pending the outcome of a judicial inquiry by the Arkansas Judicial Discipline & Disability Commission, and for all other relief to which it is justifiably entitled.

Respectfully submitted,

DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
Telephone (501) 374-9977

By: s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with

sufficient postage affixed thereon, on this the 18th day of February, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

APPENDIX 6

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am one of the attorneys of record for the Appellee in these proceedings.

2. I represent six (6) heirs and/or beneficiaries of the Estate of James Patrick Stoltz. My contact client, Mike Stoltz, contacted me around Christmas, 1992, after this opinion was delivered, and informed me that he had heard of quail hunting trips taken to Herschel Friday's farm by Jack Holt, Jr., Chief Justice of the Arkansas Supreme Court, and trips to leased land in the State of Texas. These trips supposedly occurred intermittently, but on a repetitive basis, through the years.

3. The last paragraph of the letter form Mike Stoltz requested, in no uncertain terms, that I "investigate these rumors immediately and see if there is any validity to them notify [him] of [his] legal options.

4. I have investigated this matter by various means, including, but not limited to, a direct conversation with Mr. Herschel Friday, and have been apprised that Chief Justice Jack Holt, Jr. and Herschel Friday have "kept up with each other through the years," and have hunted together in Texas on leased lands, and on Herschel Friday's farm in Mayflower, Arkansas. I have furthermore been apprised that the Honorable Chief Justice Jack Holt, Jr. has hunted in Mayflower with Mr. Friday's son. These quail hunting excursions have been intermittent, but repetitive, through the years and include at least one occasion during the "quail" season of 1992-93.

5. I have been apprised through my dealings with members of the Friday Law Firm that they believe, although

I disagree with same, that the Opinion in this Court helps insulate them from any further exposure in these proceedings based on the statute of limitations. I make *no* assertions, or insinuations, that the decision of this Court and the opinion of the Friday Firm in this regard are anything other than circumstantial; I am merely stating under oath what has been related to me to show the Friday Firm has made statements that it believes it is an interested party.

6. I have counseled with other attorneys whom I hold in the highest esteem, and have been told that, based on my client's letter alone, I have no choice but to bring this matter to this Court's attention.

s/s Charles Phillip Boyd, Jr.
CHARLES PHILLIP BOYD, JR.

VERIFICATION

I, Charles Phillip Boyd, Jr., the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/s Charles Phillip Boyd, Jr.
CHARLES PHILLIP BOYD, JR.

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 19th day of January 1993.

s/s Edwina K. Bell
NOTARY PUBLIC

My Commission Expires:

12-1-95

APPENDIX 7

Case	Party Represented by Friday Firm	Outcome	Effect on Friday Firm
Rich Mountain Elec. Coop. v. Revels, 311 Ark. 1, 841 S.W.2d 151 (1992)	Appellant	Aff'd	–
Union National Bank v. Barnhart, 308 Ark. 190, 823 S.W.2d 878 (1992)	Appellant	Aff'd	–
Ross v. Patterson, 307 Ark. 68, 817 S.W.2d 418 (1991)	Appellant	Rev'd/ Dism'd	+
Travis v. Houk, 307 Ark. 84, 817 S.W.2d 207 (1991)	Appellee	Rev'd/ Rem	–
Register v. Oaklawn Jockey Club, Inc., 306 Ark. 491, 811 S.W.2d 315 (1991)	Appellee	Rev'd/ Rem	–
Blankenship v. Burnett, 304 Ark. 469, 803 S.W.2d 539 (1991)	Appellee	Aff'd	+
Barnett v. Arkansas Transport Co., 303 Ark. 491, 798 S.W.2d 79 (1990)	Appellee	Aff'd	+
Allstate Ins. Co. v. Redman Homes, Inc., 302 Ark. 335, 789 S.W.2d 454 (1990)	Appellee	Rev'd/ Rem	–
CDI Contractors, Inc. v. Goff Steel Erectors, Inc., 301 Ark. 311, 783 S.W.2d 846 (1990)	Appellant	Aff'd	–
McCollough v. Lessenberry, 300 Ark. 426, 780 S.W.2d 9 (1989)	Appellant	Rev'd/ Rem	+

Moore v. Missouri Pacific R.R., 299 Ark. 232, 773 S.W.2d 78 (1989)	Appellee	Rev'd/ Rem	–
Ragland v. General Tire & Rubber Co., 297 Ark. 394, 763 S.W.2d 70 (1989)	Appellee	Rev'd/ Rem	–
Carton v. Missouri Pac. R.R., 295 Ark. 126, 747 S.W.2d 93 (1988) (reh'g denied, April 25, 1988)	Appellee	Rev'd/ Rem	–
Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988)	Appellant	Case Dism'd	+
Butler Mfg. Co. v. Hughes, 292 Ark. 198, 729 S.W.2d 142 (1987), *supplemental opinion reh'g denied*, 292 Ark. 206-A, 731 S.W.2d 214 (1987)	Appellant	Aff'd	–
Howard v. Wood Mfg. Co., 291 Ark 1, 722 S.W.2d 265 (1987)	Appellee	Appeal Dism'd	+
First State Bank v. Twin City Bank, 290 Ark. 399, 720 S.W.2d 295 (1986)	Appellee	Rev'd/ Rem	–
Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986)	Appellant	Rem	+